

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|---|---|----------------------|
| NICOLE A. ARENA |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 1,036,634 |
| BIG LAKES DEVELOPMENT CENTER, INC. |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| UNITED WISCONSIN INSURANCE COMPANY |) | |
| Insurance Carrier |) | |

ORDER

Respondent appeals the November 8, 2007 preliminary hearing Order of Administrative Law Judge Bryce D. Benedict. Claimant was awarded benefits in the form of authorized medical treatment with Bryce A. Palmgren, M.D., as the authorized health care provider, after the ALJ determined that claimant had suffered accidental injury arising out of and in the course of her employment with respondent.

Claimant appeared by her attorney, Richard H. Seaton of Manhattan, Kansas. Respondent and its insurance carrier appeared by their attorney, Michelle Daum Haskins of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held November 7, 2007, with attached exhibits; and the documents filed of record in this matter.

ISSUE

Did claimant suffer accidental injury arising out of and in the course of her employment with respondent on the date alleged? Respondent alleges claimant's injury is controlled by *Johnson*.¹ Claimant contends her injury occurred while experiencing considerably more trauma than that described in *Johnson*.

¹ *Johnson v. Johnson County*, 36 Kan. App 2d. 786, 147 P.3d 1091, rev. denied 281 Kan. ____ (2006).

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent as a work supervisor on July 16, 2007. Part of her duties included supervising certain clients of respondent and ensuring their safety. On July 30, 2007, claimant noticed a client, with a history of grabbing other people's food and drink, approach another client with a history of violence. Claimant rose from her chair intending to intercept the first client. As she rose from the chair, her foot slipped on the concrete floor and her knee twisted. She felt a pop and immediate pain in her left knee. This was reported to her supervisor, and claimant was provided medical care for the knee.

Claimant was referred to Mercy Regional Health Center. The initial intake history from July 30, 2007, indicates claimant was getting out of a chair when her foot slipped on the concrete floor and she heard and felt a "pop" to the left knee.² In a statement provided to Katie Ziegenhorn, a claim adjuster calling on behalf of Big Lakes Development Center, taken on August 16, 2007, claimant stated that when she got up, her knee twisted and she heard a pop, and the knee became "really painful".³ Claimant denied having any prior problems with her left knee, but also admitted she had been diagnosed with arthritis in her joints. She carried a knee brace in her car in case either of her knees began giving her problems.

PRINCIPLES OF LAW AND ANALYSIS

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

² P.H. Trans., Cl. Ex. 2.

³ P.H. Trans., Resp. Ex. 2.

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 2006 Supp. 44-501(a).

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁶

When an accident occurs at work, it is not compensable unless it is “fairly traceable to the employment,” as contrasted with hazards to which a worker “would have been equally exposed apart from the employment.”⁷

Injury or personal injury has been defined to mean,

... any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker’s usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.⁸

However, under K.S.A. 2006 Supp.44-508(e), some injuries are not “deemed to have been directly caused by the employment” if they result from “the normal activities of day-to-day living.”⁹

The ALJ determined that *Johnson* could be distinguished from the current matter as this claimant experienced the additional external trauma of her foot slipping and her knee twisting. Respondent argues that claimant’s injury description varies considerably, with the foot slipping being discussed at one time and the knee twisting being discussed at different times. The history given by claimant is consistent in that she stood up from her chair and suffered a traumatic episode more severe than that experienced in *Johnson*. Neither a slip nor a twist type injury would be associated with the normal activities of day-to-day living.

⁶ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁷ *Siebert v. Hoch*, 199 Kan. 299, Syl. ¶ 5, 428 P.2d 825 (1967).

⁸ K.S.A. 2006 Supp. 44-508(e).

⁹ *Johnson* at 789; citing K.S.A. 2002 Supp. 44-508(e).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

This Board Member finds that *Johnson* is distinguishable from this situation. This claimant suffered a traumatic injury while performing her duties for respondent. Therefore, the Order of the ALJ granting claimant medical benefits should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated November 8, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2008.

HONORABLE GARY M. KORTE

c: Richard H. Seaton, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge

¹⁰ K.S.A. 44-534a.